

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 76-1414

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANCES F. SHAND, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR
RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
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Washington, D.C. 20530.

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General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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**MEMORANDUM FOR THE NATIONAL LABOR
RELATIONS BOARD IN OPPOSITION**

On September 2, 1975, petitioner filed a charge with the Board's Regional Director alleging that the Union¹ had violated the National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 151, by failing thoroughly to prepare and present her grievance to the arbitrator in a proceeding in which she was found to have been discharged for just cause. On September 25, 1975, the Regional Director advised petitioner that, after careful investigation and consideration of the charge, the Director would not issue a complaint. The Director explained that there was no basis for finding that the Union's conduct in handling the grievance breached its statutory duty of fair representation.²

¹Hospital and Institutional Workers Union, Local 250, AFL-CIO.

²A copy of this letter is reproduced as Appendix A, *infra*.

Petitioner appealed to the Board's General Counsel, who sustained the Regional Director on the ground that there was no indication that the Union was arbitrary or unreasonable in representing petitioner at the arbitration proceeding.³ Petitioner sought review in the court of appeals of the General Counsel's action in refusing to issue a complaint on her charge. On December 28, 1976, the court of appeals granted the Board's motion to dismiss the petition for review (Pet. 5).

The court of appeals properly dismissed the petition for review. Section 3(d) of the National Labor Relations Act, 29 U.S.C. 153(d), provides that "[t]he General Counsel of the Board * * * shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints." "[T]he Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca v. Sipes*, 386 U.S. 171, 182. See also *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 155; *Saez v. Goslee*, 463 F. 2d 214, 215 (C.A. 1), certiorari denied, 409 U.S. 1024. Moreover, because the court of appeals has jurisdiction to review only final orders of the Board, and the General Counsel's refusal to issue a complaint is not such a final order, the court of appeals lacked power to entertain the petition. Section 10(f), 29 U.S.C. 160(f); *Contractors Association of Philadelphia v. National Labor Relations Board*, 295 F. 2d 526 (C.A. 3), certiorari denied, 369 U.S. 813.

³A copy of this letter is reproduced as Appendix B. *infra*.

The petition for a writ of certiorari should be denied.
Respectfully submitted,

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

MAY 1977.

APPENDIX A
NATIONAL LABOR RELATIONS BOARD

REGION 20
450 Golden Gate Avenue, Box 36047
San Francisco, California 94102
September 25, 1975

Telephone 556-3197
Area Code 415

Mrs. Frances Shand
3531 Freeman Road
Walnut Creek, California

Re: Hospital & Institutional Workers
Union, Local 250, AFL-CIO
Case no. 20-CB-3614

Dear Mrs. Shand:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

On August 6, 1975, arbitrator Patrick J. Boner issued his decision finding that your suspension was for just cause. Your charge alleges that the Union violated the Act by defaulting in its obligation to thoroughly prepare and present your grievance to the arbitrator. However, the Board has held that while a union has the statutory duty to represent employees fairly, it has also held that negligence by a Union in processing an allegedly meritorious grievance is not a violation of the Act; poor quality representation is insufficient to support a claim of unfair representation. Therefore, even assuming that the Union was negligent in the presentation of your grievance, there is no basis for finding that the Union violated the

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Act. Accordingly, I am, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C., 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on October 8, 1975. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

/s/ Natalie P. Allen
Natalie P. Allen
Regional Director

Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

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APPENDIX B

November 10, 1975

Re: Hosptial & Institutional Workers
Union, Local 250, AFL-CIO
Case No. 20-CB-3614

Mrs. Frances Shand
3531 Freeman Road
Walnut Creek, California

Dear Mrs. Shand:

Your appeal from the Regional Director's refusal to issue complaint in the captioned case has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of September 25, 1975. The arbitration proceeding appears to have been fair and regular. In your case, due process did not require that the Union provide you with a labor lawyer in the arbitration proceeding and there is no indication that the Union was unreasonable or arbitrary in not submitting all the documents you wanted introduced before the arbitrator. You have not shown that the representation the Union afforded you was based upon arbitrary, invidious or irrelevant considerations.

As for your assertion that you were denied "notes in affidavit form" by Mr. Redstrom of the Board's Regional Office, the record herein reveals that Mr. Redstrom spent more than 5 hours with you eliciting information and preparing an affidavit, which you then refused to sign because it was only random notes. The extensive document is part of the file and has been reviewed together with all the materials you have submitted. After receiving

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the entire file, we conclude that further proceedings would be unwarranted.

Very truly yours,

John C. Miller
Acting General Counsel